Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

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DANIEL TEJEDA,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

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# PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS SEVENTH DISTRICT, AMARILLO, TEXAS

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

I Whether or not "legitimate expectation of privacy" alone is a fundamentally sound burden of proof within Fourth Amendment Doctrine?

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## OPINION BELOW

The opinion of the Texas Court of Appeals, Seventh District, dated January 25, 1999, is reprinted in the appendix.

## JURISDICTION

The opinion of the Texas Court of Appeals, Seventh District, is dated January 25, 1999. The Petition for Discretionary Review was refused by the Texas Criminal Court of Appeals on June 16, 1999. It appears the jurisdiction of The United States Supreme Court is conferred pursuant to 28 U.S.C. 1257.

## CONSTITUTIONAL PROVISIONS

**U.S. CONST. amend IV.**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**U.S. CONST. amend XIV, section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**TEX. CONSTITUTION, Article I, Section 9.**

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

## STATEMENT OF THE CASE

Petitioner was indicted for the felony offense of possession with intent to deliver a controlled substance. The Petitioner's motion to suppress the evidence resulting from the illegal arrest and search was denied by the court, without specifying any reason for its finding orally or in writing. Subsequently, Petitioner entered a plea of guilty without waiving his right to appeal, in which the trial court sentence was deferred adjudicated probation for ten years and six months boot camp.

Written notice of appeal was timely filed. The Court of Appeals, Seventh District, Amarillo, overruled Petitioner's sole point of error (that the trial court erred in denying the motion to suppress because there was no probable cause to arrest appellant minor [petitioner here] for possession of alcohol under the circumstances observed by the officer) based upon lack of

standing.[1] The State of Texas raised the issue of standing for the first time on appeal. The Petition for Discretionary Review was refused by the Texas Court of Criminal Appeals.

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The Seventh Court of Appeals in its last statement before overruling the sole point of error (trial court erred in denying motion to suppress because there was no probable cause to arrest), and affirming the trial court, cited *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Cr.App.1990), subsequent to citing *Villareal v. State*, 935 S.W.2d 134, 138 (Tex.Cr.App. 1996) (Appendix, "A- 4"). In *Romero*, the Texas Criminal Court of Appeals stated that the trial court did not specify any reason for its ruling (*Romero* at 543), that the appellate court only decides whether the trial court's findings are supported by the record (*Romero* at 543), and if the trial court's decision is correct on any theory of law applicable to the case, it will be sustained. (*Romero* at 543). In *Villareal v. State*, the Texas Court of Criminal Appeals stated that the trial court gave no verbal explanation for denying the motion to suppress, and the record did not reflect whether the trial court denied the suppression motion on lack of standing or that the police entry was reasonable. *Villareal* at 137. Then the Texas Court of Criminal Appeals stated that the Court of Appeals upheld the ruling of the trial court on a theory of law applicable to the case, that appellant had no standing. *Villareal* at 137.

In petitioner's case, there were no findings of facts or reasons supporting the trial court's ruling, just as in *Romero* and *Villareal*. Accordingly, the Seventh Court of Appeals, cited *Villareal* in support of its holding that the trial court is the sole judge of the weight of testimony and its ruling lies within its discretion (Appendix, pg. "A-4"), and *Romero* in support of its final holding: "(B)ecause appellant does not claim that the initial stop of the car and the arrest of the driver was illegal, and because appellant did not introduce evidence tending to show that he had a legitimate expectation of privacy in the vehicle or the cocaine, the trial court's ruling is supported by the record and is correct on a theory of law applicable to the case. Romero, 800 S.W.2d at 543. Appellant's sole point of error is overruled." (Appendix, pg. "A-4"). Therefore, the overruling of the sole point of error by the Court of Appeals, Seventh District of Texas was based upon Petitioner's lack of right to challenge his arrest (lack of standing). The State of Texas raised the issue of lack of standing for the first time on appeal.

## REASONS FOR ALLOWANCE OF THE WRIT

In this Texas case, the Fourth Amendment to the United States Constitution is held applicable to each of the States through the Fourteenth Amendment by the United States Supreme Court. *Mapp v. Ohio*, 367 U.S. 643 (1961). Article 1, Section 9 of the Texas Constitution also protects citizens against unreasonable arrests, searches and seizures. The statutory exclusionary rule in Texas absolutely excludes all evidence violating the Fourth Amendment.[2] TEX. CODE CRIM. PRO. ANN. art. 38.23 (Vernon 1999). (Appendix, pg. "A-18).

This is a case of first impression, at least in Texas, because in all of the cases of the last twenty years, cited by the Texas Court, and in all of the U.S. Supreme Court cases and Federal cases researched[3], there is no fact situation involving an

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[2] *Garcia v. State*, 829 S.W.2d 796, 798 (Cr. App. 1992). The Texas Court of Criminal Appeals judiciously declined to create an exception to the legislative exclusionary rule. The Court of Criminal Appeals recognized a number of exceptions. *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (inevitable discovery doctrine). See also *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (independent source doctrine); *United States v. Leon*, 468 U.S. 897, 905, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (good faith doctrine). In 1987, the statute was amended by the legislature to include its sole exception, which reads as follows: "It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." Art. 38.23 (b), V.A.C.C.P. See Act of June 18, 1987, ch. 722, @ 1, 1987 Tex.Sess. Law Serv. 2208.

[3] There are a few Federal cases wherein the passenger is either stopped, detained or arrested, not separately, the right to challenge the arrest being upheld, though based upon "legitimate expectation of privacy." The fruits of the subsequent search were admissible because of the application of the Federal exceptions to the exclusionary rule. e.g. *United States v. Eylicio-Montoya*, 70 F.3d 1158, 1163 (10th Cir. 1995).

automobile stop where a separate arrest of the passenger is subsequent to the arrest of the driver, but prior to the search of the vehicle.

The Texas Court of Appeals incorrectly utilized the state case law, the corpus of which misapplies the precedent of *Rakas v. Illinois*, 439 U.S. 128 (1978) beyond its holding. [4]

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[4] The Court of Appeals could have utilized *Lewis v. State*, 664 S.W.2d 345 (Tex.Cr.App. 1984) to extend the Criminal Court of Appeals holding that a passenger detained, could have a right to challenge either the stop, the driver's arrest or the passenger's detainment, if illegal. (Appx., pg. "A-3") Acknowledging these were not Petitioner's contentions, the Court refused to apply the precedent to Petitioner's direct, personal infringement of his right against an unreasonable arrest, holding that "(B)ecause appellant does not contend that the stop of the car in which he was a passenger or the arrest of the driver was illegal, is not applicable to our decision." (Appendix, pg."A-4"). Lewis v. State was the state law basis of Petitioner's Petition for Discretionary Review to the Texas Court of Criminal Appeals in review of the Court of Appeals, which was refused, no written opinion. The principal law cited by the Court of Appeals in its opinion (see Appendix, pgs. "A-3" and "A-4") was *Villareal v. State*, 935 S.W.2d 134 (Tex.Cr.App. 1996); *Meeks v. State*, 692 S.W.2d 504 (Tex.Cr.App. 1985); and *Metoyer v. State*, 860 S.W.2d 673 (Tex.App.–Ft. Worth 1993, pet. ref'd.). In *Villareal v. State*, 935 S.W.2d 134 (Tex.Cr.App. 1996)(a challenge to the search of a residence), the Court reviewed the guidelines to establish a legitimate expectation of privacy in residences through a possessory interest), to establish that Petitioner had the burden of proving facts establishing a legitimate expectation of privacy, by showing a possessory interest in the vehicle or contraband. *Villareal* at 138. As with Petitioner's case, *Villareal* was also a no fact findings or conclusions of law, but upheld on a theory of law applicable; to wit: no standing. *Villareal* at 137. In *Meeks v. State*, an automobile was stopped by a roadblock, being an illegal detention of the vehicle, driver and passenger. The Court in *Meeks* held that the driver's suppression motion should have been granted, but the illegally detained passenger had not alleged a possessory interest in the vehicle nor the contraband seized; and therefore had no legitimate expectation of privacy in the automobile trunk–no right to challenge. *Meeks* at 510. *Metoyer v. State* was cited for premise that one must have standing to claim right, must show legitimate expectation to establish same,

The Texas courts understandably failed to fully comprehend the law of *Rakas v. Illinois* because of the degree of subsumption within its legal analyses affecting the access of proponents claiming protection under Fourth Amendment Doctrine. *Rakas* at 139.

The present law in Texas can be summarized as requiring an automobile passenger to allege and prove a legitimate expectation of privacy, by showing possessory interest in the vehicle or the contraband seized, the failure of which results in no right to challenge an illegal arrest and the ensuing search. Accordingly, the Texas Court of Appeals held that petitioner had the burden of proving a legitimate expectation of privacy, which as a passenger is a possessory interest in the automobile or the contraband seized. Here, Petitioner could not prove possessory interests, resulting in no legitimate expectation of privacy and no right to challenge the arrest. There is case law in Texas which recognizes a passenger's right to challenge the stop of the car, or the detention of the passenger, but not his arrest. (See f.n. 4).

The fact situation of *Rakas v. Illinois* should have limited any universal precedence, because its holding affects only those persons who do not suffer a direct, personal infringement of a constitutionally protected right, in that case, passengers. *Rakas* at 139-140, 141-143, 148-149. Further, it was initially a search, not an arrest; in which the police received a radio alert describing the "get away car" from a robbery, ie. previous knowledge before the stop. Yet, *Rakas v. Illinois* has become

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and passenger has no expectation of privacy with no possessory interest. *Metoyer* at 677. In *Metoyer*, there was a legal stop for a traffic violation, followed by a admission of weapons by the driver and contraband in plain view, in which the Court acknowledged that the passenger had a right to challenge the stop. *Metoyer* at 676.

the bellwether of automobile searches, with its course couched in the language of invasion of privacy from unreasonable searches. This precept of "legitimate expectation of privacy" is inapplicable to arrests, because it addresses invasion of one's privacies, not the security of one's person. As applied by the Texas courts and most, if not all of the country, it ignores the right to be secure in one's person from an unreasonable arrest. The practical effect is that the focus and the burden of presenting evidence has been shifted from the prosecution to the accused, as well as lessening, if not eradicating the burden of proof squarely placed on the government by the Fourth Amendment. The query will become to what degree this precept or direction of legitimate expectation of privacy pervades the constitutional right not to be arrested without probable cause. Moreover, sanctioning through the exclusionary rule applied to an illegal arrest, would certainly be affected because of the heretofore direction of a legitimate expectation of privacy being wrongfully applied to the probable cause circumstances of an illegal arrest. In petitioner's case, he was arrested sitting in the right, front passenger's seat. (Appendix, pg. "A-11").

Almost all of the case law concerning automobile passengers derives from the genre of a vehicle investigatory stops, initiated by previous surveillance knowledge, informant or violation-observed traffic violations–circumstances in which full probable cause is either not the burden, readily apparent, and easily proven, or avoided because of lack of standing–the right of access to claim protection from unreasonable arrest. The inevitable result is the language of *Villareal v. State*, 935 S.W.2d 134 (Tex.Cr.App. 1996), and the other case law relied upon by the Texas Court of Appeals, that "(t)he purpose of both the Fourth Amendment and Article I, Section 9 *(Texas Constitution)* 'is to safeguard an individual's legitimate expectation of privacy from unreasonable governmental

intrusions.' " *Villareal* at 138.[5] *Meeks et al. v. State*, 692 S.W.2d 504, 510 (Tex.Crim.App. 1985) and *Metoyer v. State*, 860 S.W.2d 673, 677 (Tex.App.-Ft.Worth 1993) and the case law therein, summarily embody the same concept, to-wit: no legitimate expectation of privacy resulting in no right to challenge the search. Of course, the latter automobile stop cases require proof of a possessory interest in the vehicle, as opposed to a right of possession in a dwelling.

The Supreme Court in *Katz v. United States* stated that the fourth amendment protects much more than privacy, ". . . often having nothing to do with privacy at all."[6] It protects the fundamental freedom of walking about free from "arrest or restraint on freedom of movement."[7] and the liberty of time to do so.[8] One does not lose his right to be secure in his person

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[5] Citing from *Richardson v. State*, 865 S.W.2d 944, 948 (Tex.Crim.App. 1993), also a residential search situation, via officers' judicial authorization for pen register, acquiring evidence thus increased to wire tap, held illegal.

[6] ". . . (T)he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." *Katz v. United States*, 389 U.S. 347, 350 (1967).

[7] Oft cited quote from *California v. Beheler*, 463 U.S. 1121, 1125 (1983), citing from *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) originally from *Miranda v. Arizona*, 384 U.S. 436, at 444 (1966) "...deprived of his freedom of action in any significant way."

[8] *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) held that the Fourth Amendment requires a judicial determination of probable cause where *extended restraint* on liberty following an arrest is necessary, of course not in point here, but cited here because of the Fourth Amendment's relevance to the deprivation of liberty acknowledged by the Supreme Court in *Albright v. Oliver*, 510 U.S. 266, 275 (1994).

because he decides to leave his home and go out in public, unlike the sanctity and privacy of the home dictating lesser protection in public, deemed unnecessary to decide in *Rakas v. Illinois*, 439 U.S. 128, 148 (1978). The fourth amendment has nothing to do with privacy when applied to an arrest, as opposed to a search. It is not the difference between automobiles and homes which is material and thus controlling, however relevant that may be as a factor. *Rakas* at 148. It is the difference between the inalienable right of freedom from arrest and its complementary right of privacy from invasion thereof which is material. Either one of our principal rights from within our Fourth Amendment must never be controlling to the exclusion of the other because they are inalienable together, as brother and sister. "Legitimate expectation of privacy" is the conceptualization for purposes of analyses when access to our constitutional rights is tested and considered in every court of the land. The inalienable right to be secure in one's person must have its own conceptualized direction, if our citizens are procedurally required to gain access in order to claim their right against an unreasonable arrest.

There is a difference between the right to be secure in one's person, and the right against unreasonable searches. There is a corresponding difference between the connotations of liberty and freedom of one's person from those of privacy from unreasonable searches. And finally, it is argued, an incongruity has emerged in Fourth Amendment law.

It is not a difference simply of semantics, but a dissimilarity clarified in the law. "Legitimate expectation of privacy" was first stated in *Couch v. United States*, 409 U.S. 322, 336 (1973). Confronting a pure search fact situation of an I.R.S. tax records summons upon the Petitioner's accountant, in which the summons was upheld against a fifth amendment claim, the Supreme Court specifically excluded a governmental action

against the person.

> "We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused. It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve." *Couch* at 336.

The origin of "reasonable expectation of privacy," was Mr. Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 360 (1967), also a search circumstance. The Court held that the governmental invasion was illegal because it was directed at the Petitioner personally–his telephone call, in public.

When an arrest is governed by whether one legitimately expects privacy, it is inapplicable; literally, figuratively and fundamentally.

Its literal meaning appears clear; the invasion of one's expectation of privacy is a search. Is it legitimate to say that the constitutional right to be secure in one's person exists provided the challenged evidence is found on the person? Or, the right exists if the evidence is found on the person who is then present in his friend's property? Or, the constitutional right against unreasonable arrest does not exist if the evidence is found not on, but around the person in the other person's property more or less accutely infringing their right? Courts analyze search scenarios to determine whether the exclusionary rule is applicable. If the purpose of the exclusionary rule is determent, then why base the right to challenge an arrest, and the exclusion of evidence therefrom, upon the circumstances of the subsequent search. Now, in the hypothetical situations above,

is not the constitutional right of security of one's person from unreasonable arrest still infringed in each scenario? It has something to do with burden of proof. If one were to analyze a search in terms of being secure in one's person from arrest, the implausibility of the precept of privacy becomes appreciable.

In order to challenge a search, there must be a legitimate expectation of going someplace, which must be shown by proof of theater tickets, reservations, grocery receipts, automobile gassed up, etc. And it must not be the reservations, tickets or mode of transportation belonging to someone else, a friend or date. It must be an infringement of the individual's freedom to go anyplace. If one cannot prove that they were already going someplace, then they have no right to challenge the search of their property. Consequently, if one chooses to stay home, they have no standing to challenge the search of their home. It may seem anomalous, but it is aberrant–when the burden of going forth with the evidence and the burden of proof is the precept of the right against an unreasonable arrest–to go someplace; the accused home owner cannot claim an unreasonable search without probable cause, because he cannot prove the arrest precept of a legitimate expectation of going someplace, and therefore has no right to challenge. He cannot prove the right to challenge the search upon invasion of privacy, because he cannot prove he was going anywhere. The officer conducting the search need not bother with facts showing probable cause, though he has only suspicion. The totality of the circumstances is moot and will never be reviewed by a court. How is this any different from the precept of privacy applied to a passenger and his burden to show a possessory interest in the vehicle or contraband in order to prove his right to challenge an alleged illegal arrest. The bias in both cases becomes illegitimate when the burden upon governmental conduct is reduced for the home owner from probable cause to suspicious invasion of his home; and for the passenger, it will be whatever prompted the officer

to stop the vehicle in the first place. This is tantamount to lessening the burden of proof of probable cause, if not its complete avoidance.

Figuratively, it is a nightmare. The precept of privacy is in its original, usual or exact reference, but it is not a concept representative of another analogously, or in any possible manner.[9] That is to say that the precept of legitimate expectation of privacy, conceived in the case law of searches is not representative of the historical, fundamental bulwark of the right of citizens to be secure in their person. When it is subsumed unilaterally, as opposed to being merged into the Fourth Amendment as a complement, this search conceptualized precept of privacy consumes the right against unreasonable arrests because the illegally arrested accused cannot prove the precept with "arrest circumstances," and thus has no right to challenge his arrest. Most importantly, petitioner submits that the Constitution requires that the burden of proof be replaced upon that objective for which the Fourth Amendment was drafted–our government.

Fundamentally, the Courts of the land never evaluate the totality of the circumstances within the knowledge of the officer to review whether the facts are sufficient to warrant a man of reasonable caution to believe that an offense was being committed;[10] not in *Rakas*, not in any right to challenge or so called standing case, and not in the case at hand where the arrest

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[9] Webster's New World Dictionary, Second College Edition (1970).

[10] Paraphrased from *Carroll v. United States*, 267 U.S. 132 (1925). Probable cause exists where "the facts and circumstances within their ['the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" an offense has been or is being committed. *Carroll* at 162. See *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) acknowledging totality of the circumstances.

of the petitioner passenger in the midst of the criminal episode engendered his right to challenge his alleged illegal arrest.

The precept of legitimate expectation of privacy is an accurately principled legal principle for searches and the invasion of one's privacy. When the precept of privacy is subsumed within the Fourth Amendment without limitation to the end of controlling the right of citizens to challenge an arrest, resulting in a loss of their right to be secure in their person, it places our Fourth Amendment in serious jeopardy. Without clarification of its scope the precept of privacy, in its natural merging, has limited its true merit in hindsight. It has induced a lack of understanding in the interpretation by almost all of the courts of the land, effecting such confusion that in the interpretation of our rights, some of us lose our inalienable rights. This confusion, the misapplication, has bred the bastardized shifting of the burdens of going forward and probable cause, absolutely crucial to the viability of the Fourth Amendment. Have we as a nation forgotten the Roman Empire, remembered its tragedy, but forgotten its legacy. This is magnanimous to us all, but paramount today in petitioner's case because he could be the next to lose what we are losing; every day that we do not pull up our brother in the realization that probable cause is under all that is within our Fourth Amendment. Petitioner could not prove a possessory interest in the automobile or the contraband. It was his burden to go forward with the evidence to prove the illegitimate precept of "expectation of privacy," and therefore his burden of proving his right to challenge the alleged illegal arrest without probable cause. Petitioner's failure to meet his burden resulted in no review by the Courts of the totality of the circumstances, which occurs more than occasionally. (see Texas Court of Appeal's opinion [Appendix, pgs. "A-3" and "A-4"]; f.n.1, and the case law cited therein).

The difference between our two principal fundamental

rights should be allowed in the interpretation within the Fourth Amendment. It must be reaffirmed that the right to be secure in our person against unreasonable arrests and the right of privacy from unreasonable searches complement one another. The focus and the burden of going forward to present evidence, as well as the burden of proof, must be replaced upon the government. As a legal mechanism, the precept of legitimate expectation of privacy must be clarified, not necessarily confined to search analyses, but complemented with a concept based upon the security of the person, bred from within in order that the historical burden of probable cause as to unreasonable arrests, as well as unreasonable searches is not diminished. "(e)xpectation of being secure in one's person" would preserve probable cause which is the base within the Fourth Amendment, permeating all of its concerns. To enjoy the one without the other lessons life, to live with one without the other is nothing. This is not expansionism within our Amendment, rather simple fundamentalism. The precept of expectation of privacy complemented by the precept of security of one's person in the analyses of all the constitutional circumstances would serve the courts of our land as legitimate legal principles in unimaginable ways. Consider the most complex criminal episode possible, and think of how a trial or appellate court could utilize precepts as above described, weighing each fact of the total circumstances and not be abated in their thought processes when confronted with a search that is more of an arrest, and vice versa.

As long as the differences of the protected concerns within the Fourth Amendment are clear, not necessarily equal in legitimation always, the Fourth Amendment will be preserved as a workmanlike, viable law. If the precept of privacy were allowed to continue to determine the factual proof necessary to establish the right to challenge fourth amendment arrests, then how could we leave our homes, go out onto the street or into a

restaurant with our sister or a date, and still enjoy our constitutional right to be secure in our person?

The viable premise of *Rakas v. Illinois*, 439 U.S. at 139 that the Fourth Amendment is truly where the focus of the ". . . extent of a particular defendant's rights . . . ." should be placed, combined with Fourth Amendment analyses adhering to the unique concept of each protection therein, it is believed that the realistic, valid concerns which the now partially detached dissent represented in *Rakas* and its progeny could be complemented in truer interpretation of our Amendment. Please consider all of the arguments for all of the years, which were not just concerned with what is best for arguably, the Amendment most akin to our way of life, but the everyday practicality of getting from one day to the next.

Realistic practicality is not redundant, but rather "tending to face facts; practical rather than visionary," "that can be used; workable; useful and sensible;" "of, exhibited in, or obtained through practice or action *[practical* knowledge*]*."[11] Petitioner's point through all of this is that those chosen, in the humble service of enforcing or practicing the law, which includes all professional law enforcement officers, all officers of every court in the land, desperately need basic, understandable, practical guidelines to be the interpretation of our Fourth Amendment, rather than unilateral principles or directions which could be misinterpreted and misapplied. The emerging of Fourth Amendment doctrinal concerns in *Rakas*[12], acknowledged in *Rawlings v. Kentucky*[13] should be further

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[11] "Realistic," "Practical, 2., 1." Webster's New World Dictionary, Second College Edition (1970).

[12] *Rakas v. Illinois*, 439 U.S. at 139.

[13] *Rawlings v. Kentucky*, 448 U.S. 98 (1980). "Prior to *Rakas*, petitioner might have been given 'standing' in such a case to challenge a 'search' that netted those drugs but probably would have lost his claim on

developed in order that an arrest circumstance be distinguished from search facts. Property ownership[14] in the form of "possessory interest in the car" or "legitimate expectation of privacy," combined with the now submitted "legitimate expectation of freedom and security of the person," whether in the home, in a vehicle or on the street, could then be applied as practical factors, as opposed to a denouement, not a final tying of the knot. This is just a new day for the Fourth Amendment, to display its grandeur thus: A new practicality for arrests, with more probable cause situations will induce more analyses and principles in law practicality, specifically constitutional law. Given what should be axiomatic that advocate officers of the court rarely bring all the facts with all of the law to the Courts of the land, is this not what the Fourth Amendment engenders? If all the advocate officers of the court, and all the law enforcement officers of the land had more specific, basic law, conducive to the greater fulfillment of their professional responsibilities, to guide their particular work ethic to the end of an improved criminal justice system, then possibly the critical axiom would become more the practice of law, in all legal professional endeavors.

Fundamentally, petitioner has cursorily examined merging and the precept of this petition, with some practicality and constitutionality, save the law which always reveals from within the confines of its facts. *Rakas v. Illinois*, along with *Rawlings*

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the merits. After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner." *Rawlings* at 106. The Court also stated that the separate inquiry into standing was abandoned. *Rawlings* at 104.

[14] "... arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, see *Rakas*, at 144, n. 12, property rights are neither the beginning nor the end of this Court's inquiry." *United States v. Salvucci*, 448 U.S. 83, 91-92 (1980).

*v. Kentucky* and *United States v. Salvucci* are the cases from which the Texas Courts have to ascertain their interpretation of a passenger's legitimate expectation of privacy as being an interest in the vehicle or the property seized. In *Rakas v. Illinois*, the Supreme Court advised from the beginning that the question is whether the proponent of a suppression motion "had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge." *Rakas* at 133. Accordingly, the Court reiterated the "personal" nature of the Fourth Amendment throughout the opinion. *Rakas* at 133 through 140, 143.

Federal Courts of Appeals, beginning with *United States v. Erwin*,[15] *United States v. Roberson et al.*,[16] and evolving with *United States v. Eylicio-Montoya*, 70 F.3d 1158, 1163 (10th Cir. 1995) (passenger challenging her arrest), have found ". . . no reason why a person's Fourth Amendment interests in challenging his own seizure should be diminished merely because he was a passenger, . . . ." *Eylicio-Montoya* at 1163. Specifically, the 10th Circuit Court of Appeals held that, ". . . a passenger has standing to challenge a constitutionally improper traffic stop, detention, or arrest on Fourth Amendment grounds even though, when the seizure occurs, she has no possessory or ownership interest in either the vehicle in which she is riding or in its contents." *Eylicio-Montoya* at 1164. The Court of Appeals distinguished a passenger's right to directly challenge the search from a passenger's right to " . . . seek suppression of evidence discovered in a vehicle as fruit of an unlawful stop, detention or arrest." *Eylicio-Montoya* at 1162. The 10th Circuit Court of Appeal's distinction based upon its previous decisions between a right to directly challenge a vehicle search and a right

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[15] 875 F.2d 268, 270 (10th Cir. 1989) (passenger challenging a traffic stop).

[16] 6 F.3d 1088, 1091 (5th Cir. 1993), cert denied 510 U.S. 1204 (1994)(passenger in traffic stop has right to challenge seizure of person).

to seek suppression of evidence discovered in a vehicle is right on point with Petitioner's premise. However, the potential of the decision through the analysis of invocation of the exclusionary rule became moot, as the Court held that the contraband would have been inevitably discovered. *Eylicio-Montoya* at 1165-1166. Petitioner will leave the acceptance by the 10th Circuit of the secondary treatises and experts to those more knowledgeable, but the reasoning and analysis of this case, with the case law cited therein acknowledges the difference between arrests and searches, to venture where few courts have dared. *Eylicio-Montoya* at 1163-1164. Petitioner submits that this rationale should be advanced in consternation of a truer interpretation of Fourth Amendment doctrine.

In the case at hand, Petitioner's arrest was a principal act by the officer, and as a result he had a right to challenge the search of the vehicle as it pertained to his presence in said vehicle, having been arrested while sitting in the right, front passenger's seat.[17] (Appendix, pg. A-11) Any evidence which

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Generally, the events observed by Officer Malloy were that the seventeen-year-old Petitioner was a passenger in an automobile driven by an eighteen-year-old Co-Defendant who was speeding, suspected of DWI, found to be intoxicated, but arrested for Minor in Possession of alcohol. The State based its case of probable cause of possession of alcohol on Petitioner's close proximity to the alcohol in the rear floorboard, in the small, bucket seat Geo Prism. Young men are driving around late on a Saturday night. The driver was intoxicated. There was no indication ever of any possession of the beer other than its location on the floorboard behind Petitioner's seat. There was no indicia of consumption of the alcohol by Petitioner by the officer, after witnessing his speech, appearance, breath, conduct and statements. Further, there was no evidence of any empty or partially filled bottles in any interior area of the vehicle in spite of the officer shining his flashlight all over the interior of the car during his first approach and subsequently when the driver exited for the field sobriety test. There were no questions save name, age and whether Petitioner possessed a driver's license, after which Petitioner was arrested.

may have been found in and around his person at the time of his arrest, would be a direct result of his illegal arrest. When applying an exclusionary evaluation to an arrest, a Court should entertain and weigh evidence of the manner in which the officer arrested the accused, the officer's conduct, the officer's questions revealing his intentions, his thoughts, which may or may not include the responses by the accused. The application of the exclusionary rule when analyzing arrest circumstances should be directed by the right to be secure in one's person from arrest, based upon probable cause. It could never be directed by right of privacy conceptualized law–the legitimate expectation of privacy, because probable cause and the attendant burden of proof will have been shifted to the accused, ignoring the proper focus of the hearing upon law enforcement as opposed to the accused. Sanctioning for an illegal arrest by invocation of the exclusionary rule must be centered on the conduct of the officer, not the accused's expectation of privacy. Neither should the application of the precept of security of one's person be the exclusive, even controlling direction in the criminal episode under scope. Rather, the complementing materiality, and distinct relevance of the brother and sister, under the watchful and not yet deceased father, weighing the facts as they fall or rise, must implement our Amendment into the earth of our society.

May it please the Court, this emerging is in the interest of our Fourth Amendment within, so it will endure the constant test of its viable origin. Petitioner implores that these procedural precepts more akin to the Fourth Amendment would not only protect the right of freedom from unreasonable arrest, but remove the application of the constitution and its inalienable rights from the streets and into the courtroom where they belong. The Courts would consider the circumstances of the stop, the need for protection of the officers and the officer's reasonable conduct to ensure same, the amount of time

involved, the time of day or night, and the location of the episode, to name just a few. Finally, a Court could weigh the "totality of the circumstances" to determine if those facts within the officer's knowledge were sufficient to warrant a man of reasonable caution to believe an offense had been committed."[18] In weighing all of the various circumstances, particularly those affecting probable cause, it would shed more light on the motives and conduct of officers as well as the circumstances, conduct and motives of the accused; under the searching eyes of the professional law enforcement officer cognizant that his observations and conduct will be scrutinized, argued and held accountable. A criminal episode is never just a search, or just an arrest; it is a combination of both in varying degrees, the origin of which would begin the application of the constitutional law as the episode unfolds, ebbing, flowing. Petitioner submits that this would result in the inducement of facts, extensively which could cut both ways. The result would be more plea bargains, swifter justice along with the obviously greater number of trials. However, the hearings and trials would move faster because they would be fact intensive, which could only lead to examination by all officers of the court, and the truth of the matter.

Finally, and most importantly of all, in the entire scheme of things, in the interest of justice and the absolute purpose of every citizen of the United States to enforce our laws, and prosecute vehemently those of us who ignore our society, Petitioner advances that the principles of constitutional law

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[18] Paraphrase of the language of *Carroll:* "This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Carroll v. United States*, 267 U.S. 132, 162 (1925).

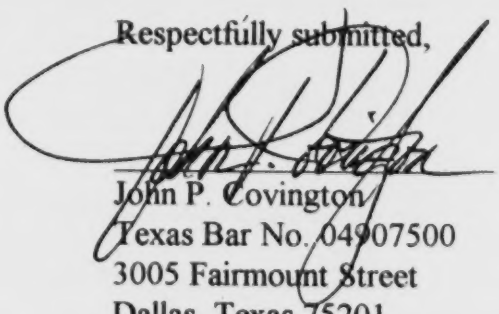
argued in this petition would induce a greater justice, which can only begin with a simple maxim–probable cause that one of us did it, or that we did not.

## Conclusion

The freedom of one's person permeates our entire corpus of law; it should never be extinguished, nor overshadowed by the right to privacy in any form. Petitioner urges that since it is procedural efficacy of a fundamental right with which we are struggling, when engendering access of a citizen's right to constitutional protection, it should be fundamental that the simplest, most basic step is the sound path. Is an arrest today, at the end of a century, still an ". . . indefeasible right of personal security, personal liberty . . . ."[19] as it was in the beginning, and ever will be in the new millenium?

Petitioner humbly prays to the United States Supreme Court that this Petition for Writ of Certiorari be allowed.

Respectfully submitted,



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Attorney for Petitioner
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19 **Boyd v. United States,** 116 U.S. 616, 630 (1886).

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APPENDIX

NO. 07-98-0064-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL A

JANUARY 25, 1999

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DANIEL TEJEDA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

---

FROM THE CRIMINAL DISTRICT COURT NUMBER ONE OF TARRANT COUNTY; NO. 0668159A; HONORABLE SHAREN WILSON, JUDGE

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Before BOYD, C.J., and REAVIS and JOHNSON, JJ.

Following his guilty plea, appellant was convicted of possession with intent to deliver a controlled substance of four

grams or more, but less than 200 grams, namely cocaine, and was sentenced to ten years, probationary term, deferred. By one point of error, appellant contends the trial court erred in denying his motion to suppress certain evidence. Based upon the rationale expressed, we affirm.

Appellant, age 17 at the time of the occurrence, was a passenger in a speeding automobile driven by Michael Workman, Jr., age 18, when the automobile was stopped by Officer Malloy on the night of September 6, 1997. When the officer approached the car, he noticed the remnants of a six pack of beer containing three full bottles on the floorboard behind the passenger seat. When the driver stepped out of the car, the officer smelled alcohol on his breath, and after determining that the driver was intoxicated, placed him under arrest. Meanwhile, appellant remained in the car. After a second officer arrived at the scene, Officer Malloy placed the driver in the patrol car and the two officers approached the passenger's side of the vehicle to identify appellant and inquire whether he could take possession of the vehicle and if he was of legal age to be in possession of the beer. Speaking through the window which was rolled down, appellant told the two officers that he did not have any identification and that he was 17 years old. At that time, the officer asked appellant to step out of the car, and although the officer did not detect any beer on appellant's breath or see any beer bottles in the front part of the car or under the passenger's seat, he placed him under arrest for minor in possession of alcohol. According to appellant's first amended motion to suppress evidence, which appears only in the clerk's record, after appellant was arrested and during the "pat" down, the officer discovered a large amount of cash. Thereafter, a search of the vehicle led to the discovery of narcotics.

After appellant was indicted for possession with intent to deliver a controlled substance, appellant filed his Motion to Suppress and then his First Amended Motion to Suppress

Evidence, seeking to suppress, among other matters, "all evidence that is a fruit or product of or was acquired as a result of a warrantless search of the vehicle in which [appellant] was a passenger at the time of arrest." Following a hearing on the amended motion, the trial court denied the motion. Thereafter, upon his guilty plea and waiver of a trial by jury, appellant was found guilty of the offense.

By his sole point of error, appellant contends the trial court erred in denying the motion to suppress because there was no probable cause to arrest appellant for minor in possession of alcohol under the circumstances observed by the officer. Rather, by the summary of his argument, appellant contends that because his arrest was illegal, the controlled substances seized from the car in which he was a passenger were inadmissible as evidence. We disagree.

In order to establish standing to object to an illegal search or conduct on the part of the police, appellant had the burden of proving facts establishing that he had a legitimate expectation of privacy in the area searched. Villarreal v. State, 935 S.W.2d 134, 138 (Tex.Cr.App. 1996); Metoyer v. State, 860 S.W.2d 673, 677 (Tex.App.–Fort Worth 1993, pet. ref'd). In order to establish his legitimate expectation of privacy, appellant, as a passenger in the car, had to assert and prove facts to establish a possessory interest in the vehicle or the property seized. Meeks v. State, 692 S.W.2d 504, 510 (Tex.Cr.App. 1985); Villarreal, 935 S.W.2d at 138; Metoyer, 860 S.W.2d at 677. Because appellant does not contend that the stop of the car in which he was a passenger or the arrest of the driver was illegal, Lewis v. State, 664 S.W.2d 345 (Tex.Cr.App. 1984) is not applicable to our decision.

By his motion to suppress, appellant did not contend he had a possessory interest in the car in which he was a passenger. Although appellant had the burden to prove facts at the hearing, the record is devoid of any evidence on his motion which would

have tended to establish that he had a legitimate expectation of privacy in the car or the cocaine. Further, the record does not contain any evidence tending to show that the search of the car which led to the discovery of the cocaine was a result of appellant's alleged illegal arrest. At a hearing on a motion to suppress evidence, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and its ruling lies within its sound discretion. Villareal, 935 S.W.2d at 138; Romero v. State, 800 S.W.2d 539, 543 (Tex.Cr.App. 1990). Because appellant does not claim that the initial stop of the car and the arrest of the driver was illegal, and because appellant did not introduce evidence tending to show that he had a legitimate expectation of privacy in the vehicle or the cocaine, the trial court's ruling is supported by the record and is correct on a theory of law applicable to the case. Romero, 800 S.W.2d at 543. Appellant's sole point of error is overruled.

Accordingly, the judgment of the trial court is affirmed.

Don H. Reavis
Justice

Do not publish.

NO. 0668158A
NO. 0668159A

THE STATE OF TEXAS IN THE CRIMINAL DISTRICT

VS. * COURT NUMBER ONE

DANIEL TEJEDA TARRANT COUNTY, TEXAS

REPORTER'S RECORD

HEARING ON DEFENDANT'S
MOTION TO SUPPRESS EVIDENCE

VOLUME 1 OF 1 VOLUME

APPEARANCES:

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FOR THE DEFENDANT:
HON. JOHN COVINGTON
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Be it remembered that on the 11th day of December, 1997, the above styled and numbered cause came on for hearing before the Honorable Sharen Wilson, Judge of the said Court, in the City of Fort Worth, County of Tarrant, State of Texas, whereupon the proceedings hereinafter contained were had.

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## PROCEEDINGS

THE COURT: The Court calls Case Number 0668158A and 0668159A, each entitled the State of Texas versus Daniel Tejeda, each on the Defendant's First Amended Motion to Suppress.

Is the State ready?

Mr. LEONARD: The State's ready.

THE COURT: Is the Defense ready?

MR. COVINGTON: Yes, Your Honor.

THE COURT: You may proceed.

MR. LEONARD: Your Honor, I have witnesses in the courtroom. I can call them, or have them sworn, or ask one of them to leave.

(TWO WITNESSES WERE SWORN)

MR. LEONARD: The State calls Officer Malloy.

MR. COVINGTON: I invoke the Rule, Your Honor.

THE COURT: The Rule has been requested. Okay. Thank you.

OFFICER MALLOY

was called as a witness by and on behalf of the State, and having been duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. LEONARD:

Q. Officer Malloy, you were just sworn in this cause; is that correct?

A. Yes, sir.

Q. Tell the Judge how are you employed?

A. I am a police officer for the City of Arlington.

Q. I want to direct your attention to Saturday, September 6th of this year, 1997, and I will ask you what shift you were working on that day, please?

A. I was working the evening shift.

Q. Were you doing speed enforcement or any other kind

of enforcement out on State Highway 360?

A. Yes, I was performing traffic enforcement.

Q. In what county is that located in?

A. Tarrant County, sir.

Q. What municipality?

A. City of Arlington.

Q. Now, at about 11:00 o'clock that evening, did you notice anything unusual?

A. Yes, sir.

Q. Tell the Court about that.

A. I was entering onto 360 from Park Row from the entrance ramp on Park Row, and I observed the vehicle in the center lane at a high rate of speed(s)(sic) passing traffic.

Q. Let me ask you this: What led you to believe it was going at a high rate of speed? The fact that the vehicle was passing other traffic on the highway?

A. Obviously, it was traveling faster than the rest of the traffic, plus I am assigned to the traffic unit, and that's part of my daily job, is traffic enforcement, and I've been trained to visually estimate speeds.

Q. What kind of car were you watching?

A. It was a Geo Prism.

Q. Without regard to visual estimation of speeds, were you able to perform another maneuver that would help you gauge the speeds of that car?

A. Yes, I was.

Q. How was that?

A. I accelerated my vehicle to match the speed of th(j)e (sic) Geo Prism that I observed and using the radar unit to determine the speed of my vehicle accurately since my speed was matched to the speed of the Prism, that would indicate the speed of the Prism.

Q. How fast was the Geo Prism going?

A. Seventy-seven miles per hour.

Q. Did you pull that vehicle over?

A. Yes, sir.

Q. How many people were in the car?

A. Two people were in the car.

Q. Did you talk to the driver of that car?

A. Yes, sir, I did.

Q. Who was the driver of that car?

A. The driver of the car was Michael Workman.

Q. Did you take a look at Mr. Workman's driver's license?

A. Yes, I did.

Q. How old was Michael Workman.

A. Michael was eighteen years old.

Q. Did you get Michael Workman out of the car?

A. Yes, sir, I did.

Q. Did you notice anything unusual about Michael Workman's breath?

A. Yes, I smelled the odor of an alcoholic beverage coming from his breath.

Q. Did you notice any alcoholic beverages inside the car?

A. Yes. When I will firs (sic) approached the car, before I spoke to Mr. Workman in the back seat of the car on the floorboard behind the passenger seat, there were the remnants of a six pack of beer. There were three bottles in the cardboard holder and three empty bottles.

Q. It was a six pack with three in it?

A. Yes.

Q. This Geo Prism that you described, is the front seat a bench seat or bucket seat?

A. It's bucket seats.

Q. You gave Mr. Workman a field sobriety evaluation?

A. Yes, sir.

Q. You determined he was intoxicated?

A. Yes, sir.

Q. Or did you?

A. He was not intoxicated to the point where he would be at a .10. However, he was under the influence of alcohol.

Q. What's the legal drinking age in the State of Texas?

A. Twenty-one.

Q. You have to be twenty-one years of age or older to legally possess or consume alcoholic beverages?

A. Yes, sir.

Q. Was Mr. Workman placed under arrest?

A. Yes, Mr. Workman was placed under arrest?

Q. During this process, did another officer of the Arlington Police Department arrive?

A. Yes, Officer Shawn Weakley arrived.

Q. What was the passenger doing during the time you were talking to Mr. Workman and giving him a field sobriety evaluation?

A. The passenger remained in the passenger seat of the vehicle. Officer Wheatley was primarily keeping an eye on the passenger. I was more concerned with my evaluation of Mr. Workman at that time. I could see him sitting in the vehicle and moving around a little bit, but nothing that would be a threat.

Q. Do you see the passenger of that vehicle in the courtroom today?

A. Yes.

Q. Would you please tell the Judge where that person is seated and describe for the Judge an article of clothing he or she is wearing?

A. Seated at the table to your right, wearing a brown jumpsuit.

MR. LEONARD: May the record reflect the officer has identified Daniel Tejeda, the Defendant?

THE COURT: It will so reflect.

Q. (By Mr. Leonard) Once you had dispensed with your business with Mr. Workman, what did you do?

A. Myself and Officer Wheatley primarily approached the vehicle to contact the passenger to identify him to see if he could take possession of the vehicle and determine if he was of legal age to be in possession of he(sic) beer that was in the vehicle.

Q. Did you see any identification of the Defendant, Daniel Tejeda?

A. No, he stated he did not have any identification.

Q. Did he verbally identify himself as Daniel Tejeda?

A. Yes, sir.

Q. Did he tell you how old he was?

A. He stated he was seventeen years old.

Q. And upon learning that the Defendant said he was seventeen, what did you do?

A. I asked him to step out of the vehicle and placed him under arrest for minor in possession of alcohol.

Q. That would be the beer you saw behind his seat in the car?

A. Yes.

MR. LEONARD: Your Honor, I pass the witness.

MR. COVINGTON: May it please the Court.

THE COURT: Go ahead.

CROSS EXAMINATION

BY MR. COVINGTON:

Q. Officer Malloy, between you and the other officer, who was the one that approached Daniel Tejeda from the passenger side? Was that you or your fellow officer?

A. Officer Wheatley initially stood outside the vehicle where he could observe both Mr. Tejeda and Mr. Workman until such time as Mr. Workman was in custody. I approached Mr. Tejeda from the passenger side.

Q. Do you know whether or not Officer Wheatley asked any questions or spoke with Daniel Tejeda out there at the scene prior to the arrest?

A. No, sir, he didn't.

Q. So then you were the one who did the speaking to Mr. Tejeda?

A. Yes, sir.

Q. And you initiated the conversation.

A. Yes, sir.

Q. At that time there(sic) when you initiated the conversation, was Daniel Tejeda outside the automobile?

A. No, sir, he initially was inside the vehicle.

Q. Was the window rolled down?

A. The window was rolled down, and then he opened the door at my request.

Q. Did you ever smell any alcohol on Mr. Tejeda's breath?

A. No, sir I did not.

Q. Do you know whether Officer Wheatley ever smelled any alcohol on his breath?

A. I couldn't answer that question.

Q. When you saw the six pack of beer- - Was it a six pack or twelve pack?

A. It was bottles. It was a six pack.

Q. And you ncticed(sic) there were three in there?

A. Three remaining, yes, sir.

Q. When you noticed that, did you shine your flashlight around the rest of the back seat?

A. Yes, I did.

Q. Did you also shine your flashlight around the front seat?

A. Yes, sir.

Q. Floorboard of the front seat?

A. Yes, sir.

Q. How about on top of the dashboard?

A. Yes, sir.

THE COURT: Can I interrupt just a second?

(A SHORT RECESS WAS TAKEN)

Q. (By Mr. Covington) Officer, when you were flashing your flashlight around the car, back seat, front seat, dashboard, floorboard, did you see any of the other three bottles?

A. No, sir, I did not.

Q. When Michael Workman got out of the car, did you see anything around his side?

A. No, sir.

Q. Did you see any beer bottles or anything between the two bucket seats?

A. No, sir.

Q. Nothing on the dash and nothing on the floorboard?

A. No, sir.

Q. I assume you checked pretty thoroughly, looking for possible weapons or anything else; is that correct?

A. Yes, sir.

Q. Did the Defendant, Daniel Tejeda, the passenger, when he got out and told you his name, or when he was sitting in the car, did he say anything about my beer, or anything like that, any statements about I've been drinking, or anything like that?

A. No

Q. Did he say anything to you about being under the influence at all?

A. Not that I could determine.

Q. Did you shine your flashlight inside?

A. Yes, sir.

Q. Were his eyes bloodshot, or anything like that?

A. No, sir.

Q. When he got out of the car, did he get out without incident?

A. He got out normally, sir.

Q. Was there anything there to lead you to believe that he had used part of the beer at that point in time?

A. At that point, no, sir.

MR. COVINGTON: No further questions.

MR. LEONARD: Just one more, Your Honor.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. LEONARD:

Q. Would you say, Officer, based on the totality of the circumstances out there, that the Defendant's behavior and circumstances were as consistent with legal behavior as they were with illegal behavior.

MR. COVINGTON: I object to that. It's a legal conclusion by the officer as a non-lawyer.

THE COURT: Overruled.

You may answer.

A. I felt the Defendant was engaging in illegal activity.

Q. That being.

A. Being in possession of alcohol.

MR. LEONARD: Pass the witness.

MR. COVINGTON: No further questions.

THE COURT: Is this witness excused.

MR. LEONARD: We ask he be excused.

MR. COVINGTON: No objections, Your Honor.

THE COURT: You are free to leave.

Your next witness?

MR. LEONARD: Your Honor, we rest.

MR. COVINGTON: I have no testimony, Your Honor.

I will stipulate that – Mr. Leonard and I vary(sic) worked on this a bit, and we didn't get a lot of facts. Based on my brief, I let him know I was only concerned with the probable cause of the arrest and not anything after that.

THE COURT: I read your brief this morning. Do you wish argument?

MR. LEONARD: I guess only if the Defense does, Judge.

Judge, the officer, all he needed to arrest the

Defendant was probable cause to believe that the Defendant as(sic) in possession of alcohol. He is seventeen years old. The beer was behind him. He was in a car with bucket seats. It was sitting in the floorboard right behind him. All he had to do was reach around and grab it. It was as close to him as the driver.

We submit to the Court under the evidence, he was in possession of the alcohol, and he was entitled to arrest him on probable cause.

THE COURT: Okay. Go ahead.

MR. COVINGTON: May it please the Court. I confess that I haven't done all of my research, and I have found the *Torres* case and *Hoague* giving the conduct for the event just as consistent with innocence as they(sic) would be with guilt.

I was enlightened in the last week or two in talking with a real criminal lawyer that I spoke with. Rather than arguing the law, which I have will(sic) some briefs in my motion, I am resting with the case simply because – I guess I will first say, without taking more than a couple of minutes to say what I have to say, of course, it's not whether or not there is possession or whether or not he would be found guilty of possession, or anything like that, having care, custody, and control. All it is is probable cause to arrest a seventeen year old kid in a car in which there was beer. It is not contraband, but it's illegal for him to have it in his possession.

When the circumstances are - - And this is my argument, that they are more consistent with things - - I am not saying there has to be a link or affirmative link from my client to the beer, or anything like that. I am just saying in the mind of the officer, objectively, at the time of the arrest, he simply, by the erratic driving and changing of lanes that was in the police report, what he testified to is pulling somebody over on Saturday night, teenagers, and where as one barely passes the test and he arrests him for DWI, then we have another teenager there who, sure enough, could have reached behind his seat in

the back and could have retrieved or gotten the beer.

The other bottles were not present. There was nothing rolling around on the floor or anything like that. There was nothing to indicate he exercised any kind of possession of the beer in any regard. Moreover, there is not one indicia from his appearance, breath, or anything else that would indicate he used part of the beer. That's my argument from the evidence. And under those circumstances, the police officer, officer Malloy, at the time of the arrest, a reasonable man under those circumstances would not be able to believe he was guilty of possession of that beer.

MR. LEONARD: Judge, we will waive any further argument.

THE COURT: Your entire conclusion is based on the fact it was behind him, and he could reach it behind him?

MR. LEONARD: Your Honor, you have two people in the car that are under the legal drinking age. He doesn't have to consume the alcohol. He merely has to possess it. The location of he(sic) alcohol is just as consistent with his possession of the alcohol as it is the driver's.

Again, all the officer - - We don't have to prove beyond a reasonable doubt that he possessed it, just that the officer had probable cause to believe he possessed it. And that would form the basis of his arrest.

THE COURT: All right. On the Defendant's First Amended Motion to Suppress Evidence, the motion is denied. And I am signing the order and entering it. That concludes this proceeding.

STATE OF TEXAS X
X
COUNTY OF TARRANT X

I, David W. Buchanan, Official Court Reporter in and for Criminal District Court Number 1 of Tarrant County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all proceedings had in the above styled and numbered cause, all of which occurred in open court and were reported by me.

I further certify that this transcription of the record of the proceedings correctly reflects the exhibits offered by the respective parties.

Witness my hand this the 9th day of January, 1998.

DAVID W. BUCHANAN
OFFICIAL COURT REPORTER
CRIMINAL DISTRICT COURT NO. 1
401 West Belknap St.
Fort Worth, Texas 76196
Phone: (817) 884-2893
Certification No. 1211
Certification expires 12-31-98

COSTS: $72.00

TEX. CODE CRIM. PRO. ANN. art. 38.23 (Vernon 1999).

Evidence not to be used

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

(b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.